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IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM, GOVERNOR OF MICHIGAN, *et al.*,
Petitioners,

v.

ELEANOR HEALD, *et al.*,
Respondents.

MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION,
Petitioner,

v.

ELEANOR HEALD, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NAPA VALLEY VINTNERS, SONOMA COUNTY WINERIES ASSOCIATION, MONTEREY COUNTY VINTNERS AND GROWERS ASSOCIATION, EL DORADO WINERY ASSOCIATION, AMADOR VINTNERS' ASSOCIATION, TEMECULA VALLEY WINEGROWERS ASSOCIATION, AND SANTA CRUZ MOUNTAINS WINEGROWERS' ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violates the dormant Commerce Clause in light of Section 2 of the 21st Amendment?

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations whose members are vintners and winegrowers located throughout the State of California. California is one of the oldest wine-growing regions in the country. Its vintners have long sold wine not only to consumers in California but nationwide. For example, at issue in *Scott* v. *Donald*, 165 U.S. 58 (1897), one of the key nineteenth century Commerce Clause discrimination cases discussed in some detail below, was the ability of vintners in California to sell their wines in South Carolina through the state dispensary on terms equal to those of South Carolina's vintners. Although much has happened since those early battles over 100 years ago, California vintners continue to have a strong interest in ensuring that the Commerce Clause affords them non-discriminatory access to consumers throughout the United States.

Amici are described in the Appendix and include Napa Valley Vintners, Sonoma County Wineries Association, Monterey County Vintners and Growers Association, El Dorado Winery Association, Amador Vintners' Association, Temecula Valley Winegrowers Association, and Santa Cruz Mountains Winegrowers' Association.

SUMMARY OF ARGUMENT

The Court has recognized that Section 2 of the Twenty-first Amendment effectively enshrined in the Constitution the powers granted the States by the Webb-Kenyon and Wilson Acts. See *Craig* v. *Boren*, 429 U.S. 190, 206 (1976). This Court has never had occasion to review in any detail, however, the implications of those Acts, and of the decisions of this Court that prompted and construed them, to ascertain

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation of this brief. All parties have consented to the filing of this brief, and copies of the consents have been filed with the Clerk.

the scope of Section 2. Such a review is particularly appropriate for this case, for it refutes conclusively the notion that Section 2 repealed the anti-discrimination principle of the Commerce Clause. U.S. Const. art. I, § 8.

Instead, the history of Section 2 reveals that Congress was concerned with an entirely different Commerce Clause problem, the "immunity" from burdensome state laws that was afforded to liquor once it was placed in interstate commerce. That immunity meant that States with laws that prohibited the manufacture and sale of domestically produced liquor could not apply those laws even-handedly to imported liquor: they could neither intercept shipments of such liquor into their state nor bar its sale. The Twenty-first amendment eliminated that immunity, but had no effect whatsoever upon the longstanding prohibition against protectionist state laws that discriminated in favor of in-state producers.

Prior to the enactment of the Webb-Kenyon Act, this Court repeatedly struck down state liquor laws under the Commerce Clause. In one line of cases, the Court declared unconstitutional state laws that imposed discriminatory taxes on imported liquor while exempting domestic liquor, as well as other laws that discriminated against imported liquor. See *Scott* v. *Donald*, 165 U.S. 58 (1897); *Walling* v. *Michigan*, 116 U.S. 446 (1886); *Tiernan* v. *Rinker*, 102 U.S. 123 (1880).

In a second line of cases, the Court struck down state laws that, although non-discriminatory, imposed direct and impermissible burdens on interstate commerce in liquor. See *Rhodes* v. *Iowa*, 170 U.S. 412 (1898); *Leisy* v. *Hardin*, 135 U.S. 100 (1890); *Bowman* v. *Chi. & N.W. Ry.*, 125 U.S. 465 (1888). The Court in *Leisy* explained that shipments of liquor across state lines are in interstate commerce, and hence are "immune" from state regulation until after the liquor has been sold in its original package, even though the State may prohibit the sale of domestic liquor. 135 U.S. at 124.

In response to the holding in *Leisy*, Congress passed the Wilson Act of 1890. That Act did not empower a State to discriminate in favor of its local liquor industry. *Scott*, 165 U.S. at 100-01. Instead, the Wilson Act allowed States to prohibit the sale of imported liquor, regardless of whether it was in its original package. *In re Rahrer*, 140 U.S. 545, 564 (1891). Nonetheless, the Court held that the immunity of liquor in interstate commerce persisted under the Wilson Act, and thus States could not prohibit importation of liquor for personal use. *Rhodes*, 170 U.S. at 422-23.

To close the loophole opened by *Rhodes*, Congress passed the Webb-Kenyon Act. That Act gave States the power to block the importation of liquor for use in violation of state law, *Clark Distilling Co.* v. *Western Maryland Railway*, 242 U.S. 311, 324 (1917), but it did not empower them to discriminate. The effect of the Webb-Kenyon Act on the holdings in *Rhodes*, *Leisy* and *Bowman*, regarding the immunity of imported liquor from state regulation, was mentioned repeatedly in the congressional debates on the Act. Conversely, there is nothing in the language, purpose or history of the Webb-Kenyon Act that suggests that it was designed to change the rule against discriminatory regulation in *Scott*, *Walling* and *Tiernan*.

The history of the Twenty-first Amendment thus demonstrates that Section 2 of the Amendment was intended simply to "constitutionaliz[e] the Commerce Clause framework established under [the Webb-Kenyon and Wilson Acts]" after the repeal of Prohibition. *Craig*, 429 U.S. at 206. The Senate debates demonstrate that Section 2 was needed to secure the Webb-Kenyon Act against both repeal by Congress and constitutional attack. The debates make clear that the purpose and effect of Section 2 is to lift the "immunity" from state regulation that otherwise would attach to liquor in interstate commerce so that liquor could be intercepted before it reached the "consignee." Section 2 thus was coincident with, and did not extend, the Webb-Kenyon Act. There was

no suggestion that Section 2 was needed to permit States to discriminate. Had Section 2 been intended to change the longstanding rule against discriminatory state regulation of liquor, someone would have mentioned it explicitly.

Finally, the history and purpose of Section 2 are consistent with the Court's post-Amendment caselaw. In recent decades, the Court has recognized that a broad (and as shown here, wholly ahistorical) reading of the Twenty-first Amendment that would obliterate the anti-discrimination principle of the Commerce Clause is unwarranted. But even the Court's first decision construing the Twenty-first Amendment, *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), is consistent with the history of the Amendment. Despite the breadth of certain language in its opinion, the Court in *Young's Market* had no occasion to determine whether the Twenty-first Amendment overturned the Court's long line of cases declaring unconstitutional discriminatory state liquor laws because the Court determined that the case simply did "not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. *Young's Market* involved only a fee that imposed a "direct burden" on interstate commerce, and thus the holding there was fully consistent with the scope of Section 2, which ensures that States may enforce even-handed laws against liquor products in interstate commerce without facing claims that those products are immune from regulation under the Commerce Clause.

ARGUMENT

I. THE WILSON AND WEBB-KENYON ACTS WITHDREW THE IMMUNITY FROM STATE REGULATION AFFORDED LIQUOR IN INTERSTATE COMMERCE, BUT DID NOT GRANT STATES POWER TO DISCRIMINATE AGAINST IMPORTED LIQUOR.

A. Before Prohibition, The Court Invalidated Both Discriminatory And Non-Discriminatory Liquor Laws Under The Commerce Clause.

By the late nineteenth century, the temperance movement was in full swing. A number of States had passed prohibition laws that outlawed the manufacture or sale of intoxicating liquors. Other States that had not yet become completely "dry" imposed substantial restrictions on the manufacture or sale of intoxicating liquors. See generally J.G. Woolley & W.E. Johnson, *Temperance Progress in the Century* 142-51, 177-78, 343-45 (1903) (discussing state liquor laws from the 1860s through the turn of the century). This Court had recognized the States' broad police powers to regulate, and even prohibit altogether, the manufacture or sale of intoxicating liquors within their borders. See *Mugler* v. *Kansas*, 123 U.S. 623, 661-62 (1887). Nonetheless, the Court repeatedly held that the Commerce Clause restricted the States' power over imported liquor.

In one line of cases, the Court declared unconstitutional state regulations that discriminated against imported liquor. In *Tiernan*, the Court considered a Texas statute that imposed an annual tax on persons who sold "spirituous, vinous, malt, and other intoxicating liquors," but exempted those persons who sold only wine or beer manufactured in Texas. 102 U.S. at 127-28. The Court explained that "commerce . . . between the States . . . is of national importance and admits and requires uniformity of regulation; [and] that the object of vesting this power in the general government was to insure

this uniformity against discriminating State legislation." *Id.* at 126. The Court determined that the Texas law was "inoperative, so far as it makes a discrimination against wines and beer imported from other States." *Id.* at 127. As the Court explained, a tax "cannot be exacted for the sale of beer and wines when [of] foreign manufacture, if not exacted from their sale when of home manufacture." *Id.*[2]

Six years later, in *Walling* v. *Michigan*, 116 U.S. 446 (1886), the Court struck down a Michigan tax that discriminated against imported liquor while exempting locally produced liquor. The Court in *Walling* summed up the governing rule:

> A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.

Id. at 455.

In a second line of cases, the Court struck down nondiscriminatory liquor regulations that, although they purported to treat imported and domestic liquor the same, nonetheless imposed direct and impermissible burdens on interstate commerce. In *Bowman*, the Court considered an Iowa law that (for all but medicinal, sacramental, or other limited purposes) prohibited the manufacture and sale of intoxicating liquors in the State. To enforce this ban, the Iowa law also prohibited common carriers from transporting

[2] Because the plaintiffs sold *liquors*, which were not subject to the discriminatory tax exemption that applied to sellers of only wines and beer, the Court affirmed the dismissal of the plaintiffs' suit seeking to enjoin enforcement of the tax. The Court explained, "There is no reason why [plaintiffs] should be exempted from the tax when selling brandies and whiskies and other alcoholic drinks . . . because they could not be thus taxed if their occupation was limited to the sale of wines and beer." *Tiernan*, 102 U.S. at 128.

liquor into Iowa from another State without prior certification that the recipient of the liquor—the "consignee"—was authorized by Iowa to sell the liquor. Although the Court did not view the restriction on transportation of imported liquor as discriminating against imported liquor, the Court nonetheless struck down the law as burdening interstate commerce. 125 U.S. at 500.

The Court began by noting that in matters involving commerce with foreign countries or between the States, Congress's "non-action . . . with respect to any particular commodity . . . is a declaration . . . that the commerce in that commodity . . . shall be free." *Id.* at 485. Although Iowa could "prohibit all domestic commerce in [intoxicating liquors] between its own inhabitants," Iowa "cannot, without the consent of Congress, express or implied, regulate commerce between its people and those of the other States of the Union in order to effect its end, however desirable such regulation might be." *Id.* at 493.

The Court expressly rejected the argument that only regulations that discriminate against the persons or products of other States run afoul of the Commerce Clause. The Court explained that nondiscriminatory regulations "directly affecting interstate commerce" likewise are prohibited. *Id.* at 496-97. The Court acknowledged the State's concern that a domestic prohibition against the manufacture and sale of intoxicating liquor could not be made effective unless it could be enforced against imported liquor. The Court, however, held that "the power to regulate or forbid the sale of a commodity, after it has been brought into the State, does not carry with it the right and power to prevent its introduction by transportation from another State." *Id.* at 500.

The Court left open whether the State could prohibit the sale of imported liquor after it arrived in the State. In his dissent, however, Justice Harlan predicted that if the Constitution conferred the right to import liquor, it also would confer the right to sell the liquor in its "original package[],"

and States would find it impossible to enforce even non-discriminatory laws against the sale of liquor. *Id.* at 514 (Harlan, J., dissenting). A person who wanted to sell liquors in Iowa "need only arrange to have them delivered to him from some point in another State, in packages of varying sizes, as may suit customers. Or, he may erect his . . . warehouse, just across the Iowa line . . . and thence . . . transport liquors into Iowa, in original packages." *Id.* at 514-15 (Harlan, J., dissenting).

The Court addressed the question left open in *Bowman* in *Leisy*, and proved Justice Harlan prescient. It held that Iowa could not prohibit the sale by a "consignee" of imported liquor in the original package. 135 U.S. at 124. The Court explained that under *Bowman*, liquor moving in interstate commerce is immune from state regulation. *Id.* at 119. It "is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that its regulations can act upon it." *Id.* Because such mingling does not occur until the imported property is sold, the immunity from state regulation extends through the sale of the imported liquor in its original package, meaning that the importer not only had the right to import liquor into Iowa, he also "had the right to sell it." *Id.* at 124.

Following *Leisy*, the broad immunity from state regulation afforded *imported* liquor under the Commerce Clause placed Iowa in an untenable position. Iowa was able to prohibit the manufacture and sale of *domestic* liquor, but unable to stop sales of imported liquor. To achieve their temperance goals, Iowa and other "dry" States needed authority to treat domestic and imported liquor the same.

B. The Wilson Act Partially Lifted The Immunity Afforded Imported Liquor, But Did Not Authorize Discrimination.

In response to *Leisy*, Senator Wilson of Iowa introduced, and Congress passed, the Wilson Act of 1890. By its plain

language, the Wilson Act was intended to permit States to treat imported and domestic liquor the same:

> That all fermented, distilled or other intoxicating liquors or liquids *transported into* any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory, enacted in the exercise of its police powers, *to the same extent and in the same manner* as though such liquids or liquors had been produced in such state or territory, *and shall not be exempt therefrom* by reason of being introduced therein in *original packages* or otherwise.

Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (emphases added).[3]

This Court then squarely held that the Wilson Act did not empower a State to discriminate in favor of its local liquor industry. In *Scott*, the Court considered a South Carolina law that required all liquor to be sold to consumers through dispensaries run by a state liquor authority. The law discriminated against imported liquor by establishing preferences for the state authority to purchase domestic liquor, by limiting the retail price of domestic, but not imported, wines, and by imposing testing requirements on imported liquors. 165 U.S. at 92-93.

After reviewing its cases striking down liquor regulations, the Court concluded that the Wilson Act "was not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce." *Id.* at 100. To the contrary, under the Wilson Act, "equality or uniformity of treatment under state laws was intended." *Id.* The Court acknowledged that a State "may forbid entirely the

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[3] The Wilson Act has never been repealed and remains codified as amended at 27 U.S.C. § 121.

manufacture and sale of intoxicating liquors," or it "may provide equal regulations for the inspection and sale of all domestic and imported liquors and be valid." *Id.* Nevertheless, the Wilson Act did not authorize the State to "establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful." *Id.* Accordingly, the Court held that "when a State recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States." *Id.* at 101.

In short, *Scott* leaves no doubt that the Wilson Act had no effect on the line of cases that held that discriminatory laws violate the Commerce Clause. Subsequent cases confirmed the point.[4] The Wilson Act thus was intended to lift the immunity afforded imported liquor under the Commerce Clause and thereby permit a State to prohibit the sale of imported liquor in its original package to the same extent the State prohibited the sale of domestic liquor. *In re Rahrer*, 140 U.S. at 564.[5]

[4] *See Vance* v. *W.A. Vandercook Co.*, 170 U.S. 438, 449-50 (1898) (explaining that although the Wilson Act "authorizes a state law to attach to an original package so as to prevent its sale, it did not contemplate and sanction the operation of a state law which injuriously discriminated against the products of other States, and which in consequence of such discrimination was not a police law in the correct sense of those words"); *Pabst Brewing Co.* v. *Crenshaw*, 198 U.S. 17, 28 (1905) (explaining that under the Wilson Act, the determination that a law is a valid police regulation "as to liquor manufactured in Missouri, *in the absence of discrimination*, is necessarily conclusive also as to the character of the law when applied to a similar article shipped from other States into Missouri after arrival at its destination, and when held for sale and consumption in that State") (emphasis added).

[5] In *In re Rahrer*, the Court rejected the argument that the Wilson Act was an unconstitutional delegation of Congressional power, explaining that Congress "simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part." 140 U.S. at 564. Congress "imparted no power to the state not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." *Id.*

Nevertheless, the Court did hold that the immunity afforded goods in interstate commerce persisted with respect to imported liquor in one important respect. The Court held that the Wilson Act did not authorize a State to prohibit importation of liquor for personal use. In *Rhodes*, the Court revisited the same Iowa law that was struck down in *Bowman*. The Court recognized that the Wilson Act allowed the Iowa law to attach to imported liquor at an earlier time than the Commerce Clause would allow, and that Iowa thus could prohibit the *sale* of imported liquor. 170 U.S. at 420. The question in *Rhodes* was whether that Act permitted Iowa law to attach the moment the imported liquor reached the state line, before the completion of delivery to the consignee. *Id.* The Court construed the words "upon arrival" in the Wilson Act to mean that state law could attach only after delivery to the consignee, and not before then. *Id.* at 421. The Court noted that the Wilson Act was enacted in direct response to the holding in *Leisy* that the immunity of goods in interstate commerce precluded Iowa from prohibiting their sale. *Id.* at 423. The Wilson Act thus did not permit States to intercept shipments of liquor at the state border. *Id.*

The decision in *Rhodes* opened a substantial loophole in state prohibition laws. Although a State could prohibit the sale of imported liquor after it was delivered to the consignee, the State was powerless to stop the flow of liquor across its borders. As a result, the mail-order liquor trade into dry States flourished under the Wilson Act. See 49 Cong. Rec. 699-700 (1912) (statement of Sen. Sanders noting that the trade had grown to about 20,000,000 gallons of liquor per year under the Wilson Act). Bootleggers also boldly imported liquor, secure in the knowledge that state officials were powerless to touch the liquor until after it was delivered. Congressman Webb explained the problem to Congress:

To illustrate, sometime ago there were three packages of liquor [one barrel containing 500 half-pint bottles of liquor, one barrel containing 250 pint bottles of liquor, and a third barrel containing 140 quarts of liquor] shipped into a town in a near-by State, consigned to individuals of doubtful character, one of whom had previously been convicted of selling liquor in violation of the law of the State. . . . Owing to the character of the packages and the reputation of the consignees, the civil authorities were morally certain that these three packages of liquor were going to be used in violation of the State laws as soon as the consignees received them . . . yet not one of [the State's] officers dared touch the liquor while it remained . . . undelivered. The sacred law of interstate commerce protected these shipments of "blind-tiger" [illegal] liquor from molestation by State officers, not only while in transit, not only while they remained in the express office or depot, but also until they were actually delivered to those who intended to violate the State laws.

H.R. Rep. No. 62-1461, at 2 (1913). Congress considered a series of bills to address the limits of the Wilson Act, and in 1913, in the Webb-Kenyon Act, Congress provided the dry States with the power to intercept interstate shipments of liquor. *See* L. Rogers, *Interstate Commerce in Intoxicating Liquors Before the Webb-Kenyon Act*, 4 Va. L. Rev. 353, 365, 369-70 (1917).

C. The Webb-Kenyon Act Closed The Hole Opened By *Rhodes*, But Did Not Empower States To Discriminate.

The Webb-Kenyon Act gave States the power to block the importation of liquor for use in violation of state law. Specifically, the Act provides that the "shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . which . . . is intended . . . to be received, possessed, sold, or in any manner

used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited." Act of Mar. 1, 1913, ch. 90, 37 Stat. 699, 699-700 (codified as amended at 27 U.S.C. § 122).[6] The Webb-Kenyon Act thus closed the gap that the Wilson Act left open. And it remains closed.

In *Clark Distilling Co.*, the Court recognized that the Webb-Kenyon Act "was enacted simply to extend that which was done by the Wilson Act." 242 U.S. at 324. Of particular relevance here, the Act's "purpose was to prevent the *immunity characteristic* of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." *Id.* (emphasis added).

At issue in *Clark Distilling* was a West Virginia law that forbade the sale of intoxicating liquors, including for personal use. *Id.* at 316. The State sought to preclude a common

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[6] The complete text of the Webb-Kenyon Act is as follows:

> That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Ch. 90, 37 Stat. at 699-700. The Webb-Kenyon Act was re-enacted by Congress after the Twenty-first Amendment was ratified and remains codified at 27 U.S.C. § 122. Act of Aug. 27, 1935, ch. 740, tit. II, § 202(b), 49 Stat. 877, 877-78.

carrier from shipping liquor, intended for personal use, into the State. The Court noted that under *Leisy*, the State's action would be unconstitutional as an impermissible direct burden on interstate commerce. *Id.* at 320. Under the Webb-Kenyon Act, however, the State's action was permissible; it did not matter that the State had not actually outlawed personal use of liquor, because it had outlawed shipment for personal use, which brought the state law within the scope of the Webb-Kenyon Act. *Id.* at 323-24.

The Court also held that the Webb-Kenyon Act was not an unconstitutional delegation of congressional power to the States. The Court explained that "the will which causes the prohibitions to be applicable is that of Congress, since the application of state prohibitions would cease the instant the act of Congress ceased to apply." *Id.* at 326. The Court noted that under *Leisy*, interstate commerce in liquor was immune from state regulation unless Congress provided otherwise. *Id.* at 328-29. Congress had provided otherwise in the Wilson Act, by which Congress "divest[ed]" interstate shipments of liquor of their interstate commerce character so as to "strip them of the right to be sold in the original package free from state authority." *Id.* at 330. The Webb-Kenyon Act was "but a larger degree of exertion of the identical power which was brought into play in the [Wilson Act]," which had been upheld in *In re Rahrer*, and thus the Webb-Kenyon Act likewise was constitutional." *Id.*

The Court recognized in *Clark Distilling* that the historical environment of the Webb-Kenyon Act, including the debates on its passage, demonstrates that the purpose of the Act was to close the hole left open by the Wilson Act by further removing the immunity of liquor in interstate commerce, thereby giving States the ability to interrupt liquor shipments within their borders, according to their general prohibition policies. *Id.* at 322. The history of the Webb-Kenyon Act reflects no intent to change the long-standing rule against discriminatory state regulation.

Congressman Webb explained that the Webb-Kenyon Act was intended to address the problem that "under the present law and decisions [the Wilson Act and the decision in *Rhodes*], no State can interfere with the interstate shipment of liquor until it has been actually delivered to the consignee." H.R. Rep. No. 62-1461, at 2. "[B]ecause of this present state of the law no State official is permitted to touch any interstate shipment of liquor consigned to a 'blind tiger [an illegal seller of liquor],' 'bootlegger,' or 'speak-easy' until after it has been delivered to such violator of the State law." *Id.* Congressman Webb further explained that the proposed law would permit the State officers "to seize such liquor . . . and try it upon the question of whether it was intended to be used in violation of the laws of the State, and if the jury should find that it was so intended the delivery to the consignee would be prevented and the liquor confiscated." *Id.*

Senator Kenyon of Iowa (the laws of which State were declared unconstitutional in *Bowman*, *Leisy* and *Rhodes*) likewise explained that the bill was intended to address the immunity from state regulation afforded imported liquor under the Commerce Clause, and to allow the States to treat imported liquor according to their general liquor prohibitions (and foreshadowed what was to come with Section 2 of the Twenty-first Amendment):

> I am not concerned at all with the question of whether a State in the exercise of its police power might adopt a law prohibiting the manufacture or sale of intoxicating liquors. If it does do so, it ought to be able to make that law effective. If it adopts the contrary policy, it should be permitted to make that effective. If intoxicating liquors can be freely shipped into a State which has a prohibitory law and the State government is powerless to prevent it, and the Federal Government is likewise powerless to prevent it, if this liquor is to remain in the twilight zone between Federal and State jurisdiction,

> then, indeed, it is time for some further amendment to our Constitution.

49 Cong. Rec. 761 (1912).

The effect of the Webb-Kenyon Act on the holdings in *Rhodes*, *Leisy* and *Bowman* was mentioned repeatedly in the debates.[7] Conversely, no one ever suggested at any time that the Webb-Kenyon Act would change the rule in *Scott*, *Walling* or *Tiernan*, to permit States to discriminate against in-state and out-of-state liquors. Given that *Scott* held that the Wilson Act did not authorize States to discriminate, if the Webb-Kenyon Act had been intended to change the result of *Scott*, it is inconceivable that such an intent would have been left unspoken during the extensive debates.

Senator Root raised the concern that the Act placed "no limit upon the regulation by every State" of interstate traffic in liquor. 49 Cong. Rec. 2,915 (1913). Senator Stone made it clear, however, that the Act concerned *only* the ability of States to treat imported liquor the same as domestic liquor; it "would merely put the shipper outside of Missouri or Iowa or Arkansas upon a level, that is upon terms of equality, so far as State law and regulation go, with the shipper within the State." *Id.* at 2,917. Indeed, permitting discrimination would have been inconsistent with the very purpose of the Act, as Congressman Webb explained:

> [The Act will] remove the restrictions which now bind the action of the States in their efforts to honestly enforce their lawful prohibition enactments. . . . No man outside of my State ought to have a superior right to the citizen within my State. . . . If a man has not a right in my State to sell liquor, then certainly a citizen living in the District of Columbia ought not to have a superior right to enable him to sell it inside my State.

[7] *See, e.g.*, 49 Cong. Rec. at 764-67; 49 Cong. Rec. 2,529, 2,689-90, 2,794-96, 2,807, 2,817, 2,834, 2,909-10 (1913).

Id. at 2,807. Instead of authorizing discrimination, the Webb-Kenyon Act "only stops the business of selling liquor within dry territory by persons outside that territory in violation of law." 49 Cong. Rec. at 700 (statement of Sen. Sanders).

There is no merit to Petitioners' contention that the Senate's rejection of a proposed section 2 to the Webb-Kenyon Act reflects a congressional intent to permit discrimination. To the contrary, the deletion of the language reflects nothing more than legislative expediency. Senate bill 4043 originally included, in a section 2, the language of the Wilson Act, amended to make the state law attach "upon arrival *within the boundaries* of such State or Territory and *before delivery to the consignee*." 49 Cong. Rec. at 2,687 (emphasis added). The bill that had already been approved by the House contained only language similar to that in section 1 of the Senate bill. See *id.* at 2,918, 2,920. Senator Gallinger moved to delete section 2 "in the hope and belief that it will more likely become a law than if we send the Senate bill to the House as a separate and independent measure, couched in different language from that which is employed in the House bill." *Id.* at 2,918. Section 2 thus was deleted solely to conform the Senate bill to the House bill. There was no discussion whatsoever of any need to delete the proposed Section 2 in order to permit States to engage in otherwise unconstitutional discrimination.[8]

[8] In discussing the proposed section 2, Senator Kenyon raised the concern that there was "some incongruity" between section 1, which prohibited shipments of liquor with the intent to violate the law of the State, and section 2, which "would seem to recognize the transportation of liquors and at the same time apply the police powers." 49 Cong. Rec. at 702; *see also id.* at 2,687. Senator McCumber raised the concern that section 2 could be construed as an unconstitutional delegation of congressional authority, whereas section 1 was cast in prohibitory terms and made Section 2 unnecessary. *Id.* at 702-03. Other Senators were concerned that section 2 might be used to interfere with personal use of liquor, arguing that under section 2, a State could "interrupt an interstate shipment of liquor when it arrives within its borders," regardless of whether the shipment was intended to be used in violation of state law. *Id.*

Moreover, the Court has declared that "the power to regulate which was manifested in the Wilson Act and that which was exerted in enacting the Webb-Kenyon Law are essentially identical, the one being but a larger degree of exertion of the identical power which was brought into play in the other." *Clark Distilling*, 242 U.S. at 330. The power that was manifested in the Wilson Act did not permit States to engage in discrimination. *Scott*, 165 U.S. at 100. The deletion of the proposed section 2 thus did not clear the way for discriminatory state regulations.

The manifest purpose of the Webb-Kenyon Act was to remove the immunity from state regulation that the transportation of imported liquor into dry States continued to bear after the Wilson Act, so that States could seize liquor shipments in violation of state law before they reached the consignee. In sum, there is nothing in the language, purpose or history of the Webb-Kenyon Act to suggest that it was intended to change the rule of *Scott* and empower States to discriminate by erecting protectionist barriers to imported liquor.

D. The Failure Of Prohibition Prompted Passage Of The Twenty-First Amendment But Provided No Basis To Empower States To Discriminate Against Interstate Commerce In Liquor.

The struggle of the dry States to enforce their laws against imported liquor was temporarily suspended in 1919 with the ratification of the Eighteenth Amendment. That Amendment prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes." U.S. Const. amend. XVIII, § 1. Congress and the States had "concurrent power" to enforce the Amendment by

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at 2,688. None of the objections to proposed section 2 centered on discrimination.

"appropriate legislation." *Id.* § 2. With the passage of the Volstead Act in 1919, the country officially became "dry." National Prohibition Act, ch. 85, 41 Stat. 305 (1919).

By 1933, the country was in general agreement that the "Noble Experiment"[9] had failed. Illegal traffic in liquor was rampant. Consumption of intoxicating beverages remained popular, leading even upstanding citizens to flout the prohibition laws.[10]

Moreover, the Eighteenth Amendment had effected an unprecedented transfer of police power from the States to the federal government. Although the States had authority under the Eighteenth Amendment to pass legislation to enforce the Amendment, federal legislation was supreme and so the responsibility for enforcement fell largely on the federal government. As Senator Wagner explained in the debates surrounding repeal of the Eighteenth Amendment,

> [T]he question which has troubled the American people since the eighteenth amendment was added to the Constitution was not at all concerned with liquor. It was a question of government; *how to restore the constitutional balance of power and authority* in our Federal system which had been upset by national prohibition.

76 Cong. Rec. 4,144 (1933) (emphasis added). Section 2 of the Twenty-first Amendment restored that balance effectively by writing the relief from Commerce Clause immunity

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[9] "Our country has deliberately undertaken a great social and economic experiment, noble in motive and far-reaching in purpose." H. Hoover, *The New Day: Campaign Speeches of Herbert Hoover, 1928*, at 29 (1928), *available at* http://www.bartleby.com/66/88/28888.html.

[10] As Congressman LaGuardia explained during the repeal debates, "A change in our liquor policy is necessary, not only because of the widespread violation of the law by the criminal element but the general and universal disregard of the law by well-meaning, law-abiding people." 76 Cong. Rec. 4,514 (1933).

provided by the Wilson and Webb-Kenyon Acts into the Constitution.

II. SECTION 2 OF THE TWENTY-FIRST AMENDMENT EFFECTIVELY WROTE THE WEBB-KENYON AND WILSON ACTS INTO THE CONSTITUTION, BUT DID NOT AFFECT THE RULE AGAINST DISCRIMINATORY STATE REGULATION OF LIQUOR.

With the repeal of the Eighteenth Amendment, States once again were faced with the prospect that the immunity from state regulation afforded liquor in interstate commerce would frustrate state efforts to remain "dry" following the end of nationwide prohibition. Congress addressed this concern in Section 2 of the Twenty-first Amendment,[11] which provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2. Section 2 was included not to expand the scope of the Webb-Kenyon and Wilson Acts, but to preserve them against repeal or constitutional attack.

A. The Debates Surrounding Section 2 Demonstrate That It Was Intended To Constitutionalize The Commerce Clause Framework Established Under The Wilson And Webb-Kenyon Acts.

As this Court has recognized, the "wording of § 2 . . . closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes." *Craig*, 429 U.S. at 205-06 (footnote omitted). Prior to Prohibition, Congress (through the Webb-Kenyon Act) had granted dry States the ability to intercept out-of-state liquor

[11] Section 1 of the Amendment repealed the Eighteenth Amendment. U.S. Const. amend. XXI, § 1. Section 3 provided for ratification by conventions rather than by the state legislatures. *Id.* § 3.

before delivery to the consignee. Although the Webb-Kenyon Act was not repealed by the Eighteenth Amendment, *McCormick & Co.* v. *Brown*, 286 U.S. 131, 141 (1932), its constitutionality was not considered sufficiently secure to ensure that States that chose to remain dry could protect themselves against unrestrained importation of liquor. Two central themes emerge from the Senate debate on Section 2: (1) Section 2 was needed to secure the Webb-Kenyon Act against both constitutional attack and repeal; and (2) Section 2 was coincident with, and did not extend, the Webb-Kenyon Act.

The need to secure the Webb-Kenyon Act from constitutional attack and repeal was highlighted by Senator Borah. After Senator Robinson proposed to strike Section 2 from the resolution entirely, 76 Cong. Rec. 4,170 (1933), Senator Borah argued that Section 2 was necessary because absent Section 2, Congress would be "asking the dry States to rely upon the Congress of the United States to maintain indefinitely the Webb-Kenyon law." *Id.*; see also *id.* at 4,141 (statement of Sen. Blaine).

Moreover, Senator Borah argued, the Webb-Kenyon Act was "still of doubtful constitutionality and which, as it was upheld by a divided court, might very well be held unconstitutional upon a re-presentation of it." *Id.* at 4,170. As Senator Borah explained,

> The Webb-Kenyon Act was sustained by the Supreme Court of the United States by a divided court. The President of the United States—President Taft, who was afterwards Chief Justice—vetoed it on the ground that it was unconstitutional. The Attorney General of the United States rendered an opinion to the effect that it was unconstitutional. Elihu Root, when in the Senate, argued that it was unconstitutional. Mr. Justice Sutherland, who is now upon the Supreme Bench, argued before the Senate that it was unconstitutional.

Id.; see also *id.* at 4,141 (statement of Sen. Blaine). Senator Borah went on to describe the "history of the fight of the dry States to remain dry and be protected," from *Bowman* and *Leisy* through the Wilson Act and the Webb-Kenyon Act. *Id.* at 4,170-72. Section 2 was necessary, he argued, to ensure that there would never be a return to the situation that *Bowman* and *Leisy* had created. *Id.* at 4,172. After Senator Robinson withdrew his challenge to Section 2, Senator Borah responded:

> All this was sought to be remedied by the Webb-Kenyon Act, and I am very glad indeed the able Senator from Arkansas has seen fit to recognize the justice and fairness to the States of incorporating it permanently into the Constitution of the United States.

Id. Thus, as Senator Blaine, speaking on behalf of the Senate Judiciary Committee, which had proposed the Twenty-first Amendment, explained, Section 2 was included "to assure the so-called dry States against the importation of intoxicating liquor into those States." *Id.* at 4,141.

The Senate debates over Section 2 also made clear that its purpose and effect would be to lift the "immunity" from state regulation that otherwise would attach to liquor in interstate commerce, to allow imported liquor to be intercepted before it reached the "consignee" and thus "assist the States that want to be dry to remain dry." *Id.* at 4,168. For example, Senator Walsh specifically referred to the Court's ruling in *Rhodes*, which he described as holding "that under the existing Constitution the right obtains on the part of any citizen to pass his goods into another State, and they remain under the protection of the Federal Constitution until they actually reach the hands of the consignee." *Id.* at 4,219. As Senator Walsh explained, under *Rhodes*, imported liquor "is immune from any control by State statutes until it actually reaches the possession of the consignee." *Id.* He stated that he supported Section 2 because it, like the Webb-Kenyon Act, would "make the intoxicating liquor subject to the laws of the State

once it passed the State line and before it gets into the hands of the consignee as well as thereafter." *Id.* Senator Glass then echoed this point in his response, stating that under Section 2, "there can be no consignee of intoxicating liquors in a dry State." *Id.*

Conversely, the issue of what one "wet" State could do regarding competing liquor from another "wet" State simply was not under consideration. As Senator Glass explained, "Liquors may be shipped across a State in interstate commerce from one wet State to another wet State, but [Section 2] as I have drafted it prohibits the shipment of intoxicating liquors into a State whose laws prohibit the manufacture, sale, or transportation of liquors." *Id.*

Although Senators Borah and Walsh took pains to discuss the problem of the immunity afforded liquor moving in interstate commerce, which was at issue in the Court's decisions in *Bowman*, *Leisy* and *Rhodes*, there was *no* discussion by any Senator of the decisions in *Scott*, *Walling* or *Tiernan*, or of any issue involving the States' authority to discriminate against interstate commerce. As noted above, the Court previously had held in *Scott* that the Wilson Act did not permit States to discriminate against interstate commerce in liquor, and Congress made no effort to grant States that power in the Webb-Kenyon Act. Had Section 2 been intended to change the longstanding rule against discriminatory state regulation of liquor, some mention of it would have been made during the debates. However, the debates are tellingly silent on this point. In short, the history of Section 2 makes it clear that Section 2 was intended simply to preserve the Webb-Kenyon and Wilson Acts against repeal or constitutional attack; it was not intended to affect the long-standing rule against discriminatory state liquor laws.

Neither the House debate nor the State Ratification Conventions included any substantial discussion of Section

2.[12] Nonetheless, the sporadic discussions of Section 2 in the House of Representatives make clear that members of the House viewed it as nothing more than an "attempt[] to protect dry States." 76 Cong. Rec. at 4,518 (statement of Rep. Robinson). Congressman Lea, in an extension of remarks on an appropriation bill, prior to the House debates on the proposed Amendment, characterized Section 2 as "the extreme of State rights." *Id.* at 2,776. But his concern was that because Congress already had the authority to prevent interstate shipments of liquor in violation of state laws, Section 2 was unnecessary and might require the federal government to sanction "unwise" state laws. *Id.* Others in the House stressed that the Amendment returned to the States the power to choose whether to be dry, as well as the responsibility for enforcing their prohibition laws, matters that nationwide Prohibition had temporarily vested in the federal government. See *id.* at 4,523-24 (statement of Rep. McSwain). There was no suggestion that Section 2 would do anything more than enshrine the Webb-Kenyon and Wilson Acts into the Constitution.

B. Congress's Rejection Of A Proposed Section 3 To The Twenty-First Amendment Does Not Suggest That Section 2 Was Intended To Do More Than Write The Webb-Kenyon And Wilson Acts Into The Constitution.

Congress's rejection of a proposed Section 3 has no bearing on whether Section 2 overruled the longstanding prohibition against discriminatory state liquor regulations. Proposed Section 3 would have provided Congress with "'concurrent

[12] Like the Senate debate, the House debate largely focused on ratification by conventions instead of legislatures and whether the Amendment would prevent the return of the saloon. *See, e.g.*, 76 Cong. Rec. at 4,511 (Statement of Rep. Guyer); *id.* at 4,515 (Statement of Rep. Celler). The state conventions generally focused on the question of repeal and did not debate Section 2. *See generally Ratification of the Twenty-First Amendment to the Constitution of the United States* (E.S. Brown ed., 1938).

power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.'" 76 Cong. Rec. at 4,141. This provision was proposed in order to give Congress the power "to prevent the restoration of the saloon." *Id.* (statement of Sen. Blaine). This provision was the subject of fervent objections that it "does not correct the central error of national prohibition" because it "does not restore to the States responsibility for their local liquor problems [or] withdraw the Federal Government from the field of local police regulation into which it has trespassed." *Id.* at 4,144 (statement of Sen. Wagner). As Senator Wagner succinctly explained, if the proposed Section 3 were adopted, the country would "have expelled the system of national control [of liquor] through the front door of section 1 and readmitted it forthwith through the back door of section 3." *Id.* at 4,147. Section 3 thus was eliminated because it would have given the federal government too much power over local liquor matters, thus ignoring the lessons of Prohibition.

In arguing against Section 3, Senator Blaine stated that "[t]he purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States." *Id.* at 4,143. Considered in isolation, this statement could suggest that the scope of Section 2 was intended to relieve the States of all Commerce Clause constraints on their authority. Senator Blaine made that one statement, however, not as an explication of the scope of Section 2, but as part of an argument against the inclusion of Section 3. He stated that under Section 2, the States "are granted larger power in effect and are given greater protection, while under section 3 the proposal is to take away from the States the powers that the States would have in the absence of the eighteenth amendment." *Id.* Senator Blaine therefore argued that "section 3 is inconsistent with section 2, and the two sections are incompatible, and that section 3 ought to be taken out of the resolution." *Id.* Thus,

when viewed in context, it becomes clear that Senator Blaine's statement did not refer to the wholesale repeal of the Commerce Clause to permit discriminatory and protectionist state laws. Instead, Section 3's deletion restored to the States their *police powers* to regulate, or even prohibit, the use of liquor in saloons or elsewhere within their borders. The statement thus cannot carry the weight of a conclusion that Section 2 would permit wet States to engage in discrimination against other wet States.

* * * *

In sum, the history of the Twenty-first Amendment shows that—despite numerous decisions by this Court striking down discriminatory state laws—Congress never attempted to grant States the right to discriminate. Instead, Congress chose to enshrine the Webb-Kenyon and Wilson Acts into the Constitution to ensure that the immunity from State regulation afforded liquor in interstate commerce would never again prevent dry States restricting the flow of liquor across their borders. The history of the Amendment thus demonstrates that the Amendment had no effect on the traditional rule that the Commerce Clause prohibits economic protectionism.

III. THE DECISION IN *YOUNG'S MARKET* IS CONSISTENT WITH THE HISTORY OF THE TWENTY-FIRST AMENDMENT.

The Court has long recognized that the Twenty-first Amendment does not provide the States with unfettered authority over intoxicating liquors.[13] Nevertheless, it is useful to look closely at *State Board of Equalization* v. *Young's Market Co.*, 299 U.S. 59 (1936), both because it was the Court's first case to construe the Amendment and because, for a short period, the case was cited as support for a broad reading of the Amendment. A careful reading of *Young's Market* demonstrates it is not inconsistent with the history of the Twenty-first Amendment and presents no obstacle to a

[13] *See infra* notes 14-15.

clear holding that the Amendment did not *sub silentio* repeal the anti-discrimination principle of the Commerce Clause.

In *Young's Market*, several wholesalers challenged a California regulation that imposed a license fee of $500 for the privilege of importing beer to any place within California. The license to import did not include the privilege of selling, for which wholesalers paid a separate license fee of $50. The plaintiffs claimed that importer's license requirement discriminated against wholesalers of imported beer, in violation of the Commerce Clause. *Id.* at 60-61.

The Court, however, expressly determined that the case simply did "not present a question of discrimination prohibited by the commerce clause." *Id.* at 62. The Court explained that the California regulations imposed "no discrimination against [the plaintiffs] *qua* wholesalers" because "[t]he fee exacted for the privilege of selling, and the conditions under which a sale may be made, are the same whether the beer to be sold is imported or domestic or is both." *Id.* at 61. Any Commerce Clause concerns raised by a fee for the privilege of importing were raised "not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce," which would have raised such concerns "even if the State had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business." *Id.* at 62. Because the case did not involve discrimination, the Court had no occasion to determine whether the Twenty-first Amendment overturned the Court's long line of cases striking down discriminatory state liquor laws.

The holding in *Young's Market* is consistent with the historical understanding that the Twenty-first Amendment addressed the "immunity" problem of liquor in interstate commerce by writing the Webb-Kenyon and Wilson Acts into the Constitution, but had no effect on the longstanding rule against discrimination. Any Commerce Clause concerns arose in *Young's Market* because the fee was a "direct burden

on interstate commerce." *Id.* at 62. As explained above, the Webb-Kenyon and Wilson Acts were intended to permit States to impose such "direct burdens," which previously had been prohibited by *Bowman*, *Leisy* and *Rhodes*. See, *e.g.*, *McCormick*, 286 U.S. at 142-43. Because *Young's Market* involved only a fee that imposed a "direct burden" on interstate commerce, the result in *Young's Market* thus requires no departure from the conclusion that Section 2 was intended merely to "constitutionaliz[e] the Commerce Clause framework established under those statutes." *Craig*, 429 U.S. at 205-06. Further, because all of the plaintiffs were California citizens, *Young's Market*, 299 U.S. at 60, the Court's holding went no further than to decide that the State could impose such a "direct burden" by charging local entities a fee for the "privilege of importation." It does not follow that a State may bar an out-of-state producer from entering a market that the State has determined should be open to in-state producers.

Shortly after *Young's Market* was decided, the Court, without further discussion of Section 2 or the fact that *Young's Market* did not involve discrimination, relied upon dicta in *Young's Market* to conclude that "the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Joseph S. Finch & Co.* v. *McKittrick*, 305 U.S. 395, 398 (1939); *Indianapolis Brewing Co.* v. *Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); see also *Mahoney* v. *Joseph Triner Corp.*, 304 U.S. 401, 403-04 (1938) ("[S]ince the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor."). However, the Court in *Young's Market* admitted that it did not consider the history of Section 2. 299 U.S. at 63-64. When the history of the Amendment is considered, it becomes clear that Section 2 left intact the anti-discrimination principle of the Commerce Clause, and that the holding in *Young's Market* provided no

basis for reading Section 2 more broadly than its language and evident purpose would support.

In any event, subsequent decisions of this Court have made it clear that the Twenty-first Amendment does not have the tremendous breadth that certain language in *Young's Market* and the cases that immediately followed may suggest.[14] The Twenty-first Amendment does not affect the restraints of equal protection, free speech, due process, establishment of religion or the Import-Export Clause.[15] It also should not be read to repeal the anti-discrimination component of the Commerce Clause in the area of intoxicating liquors. See *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984) (holding that a discriminatory tax exemption in favor of

[14] *See Healy* v. *Beer Inst.*, 491 U.S. 324, 340-41 (1989); *id.* at 344 (Scalia, J., concurring); *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 352 (1987) (holding that the Twenty-first Amendment did not save a state law that authorized price fixing by wholesalers); *Brown-Forman Distillers Corp.* v. *N.Y. State Liquor Auth.*, 476 U.S. 573, 584-85 (1986) (holding that the Twenty-first Amendment did not save New York's price affirmation law); *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 276 (1984); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 716 (1984) (holding that state liquor regulations were preempted despite the Twenty-first Amendment); *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 109, 114 (1980) (holding that the Twenty-first Amendment did not save California's wine pricing system from violating the Sherman Act); *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964); *United States* v. *Frankfort Distilleries, Inc.*, 324 U.S. 293, 299 (1945) (explaining that Twenty-first Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries"); *Collins* v. *Yosemite Park & Curry Co.*, 304 U.S. 518, 538 (1938) (rejecting the argument that the Twenty-first Amendment gave California the right to regulate the importation from other States to, and sale of liquor within, Yosemite National Park).

[15] *See 44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484 (1996) (plurality opinion) (commercial speech); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig*, 429 U.S. at 206-07 (equal protection); *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971) (due process); *Dep't of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Import-Export Clause).

locally-produced wines and liquors is not saved by the Twenty-first Amendment); cf. *Healy* v. *Beer Inst.*, 491 U.S. 324, 340-41 (1989) (holding that the State's price affirmation statute violated the Commerce Clause because it discriminated against brewers and shippers of imported beer, and had the effect of controlling commerce occurring outside the State); *id.* at 344 (Scalia, J., concurring) (explaining that the law's "discriminatory character eliminates the immunity afforded by the Twenty-first Amendment").

To the contrary, "[t]o draw a conclusion from [the Court's early Section 2 cases] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964). As the history of the Twenty-first Amendment demonstrates, the purpose of Section 2 of the Amendment was simply to write the Webb-Kenyon and Wilson Acts into the Constitution; it "was not to empower States to favor local liquor industries by erecting barriers to competition" *Bacchus Imports*, 468 U.S. at 276.

CONCLUSION

The Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

Amici include the following organizations of California vintners and winegrowers:

Napa Valley Vintners: The Napa Valley Vintners is a nonprofit regional trade association with an active membership of nearly 250 Napa Valley wineries. Founded in 1943, the Napa Valley Vintners represents a tradition of dedicated vintners and grape growers who have worked and cared for this premier wine-growing region since the early 1800s. Today, the members of the Napa Valley Vintners focus on preserving Napa Valley as a viticultural and enological treasure, producing the highest quality wines, and promoting the Napa Valley Appellation both nationally and internationally as one of the finest wine-growing regions in the world.

Sonoma County Wineries Association: The Sonoma County Wineries Association is a trade association committed to promoting the wines of the fourteen wine-growing appellations in Sonoma County, California. Franciscan mission fathers laid the foundation for the Sonoma County wine industry with the planting of mission vineyards in 1823. Today, in Sonoma County, there are more than 190 wineries, over half less than 20 years old. The Sonoma County Wineries Association membership includes 170 Sonoma County wineries and vineyards, including small, family-owned wineries that, as they did over 150 years ago, continue to exist comfortably alongside larger entities, each producing premium wine in its own unique style.

Monterey County Vintners and Growers Association: The Monterey County Vintners and Growers Association (MCVGA) was formed in 1973 to establish Monterey County as a premium wine grape-growing region. Since that time, Monterey Wine Country has grown to over seventy-five vintners and growers and boasts nearly 40,000 acres of

grapes, making it one of the largest premium wine grape-growing regions in California. The Monterey County Vintners and Growers Association brings together the talents and resources of grape growers and wine producers to promote and support their leadership in the art, the science and the business of wine.

El Dorado Winery Association: The El Dorado Winery Association is a trade association that is comprised of nineteen, small, family wineries in El Dorado County, California. Wines have been produced in El Dorado County since the early 1850s. Today, the members of the El Dorado Winery Association make fine wine in small lots, producing from just over one thousand cases of wine per year to about thirty thousand cases per year. The members of the El Dorado Winery Association are dedicated to developing and promoting the El Dorado Appellation.

Amador Vintners' Association: The Amador Vintners' Association is a regional trade association of twenty-five wineries from Amador County, California. Located in the western foothills of the Sierra Nevada mountain range in central California, Amador County boasts 2,700 acres of wine grapes—a high percentage of which are farmed organically—and twenty-five wineries. Wines have been produced in Amador County since the Gold Rush of the 1850s, and some of the vineyards planted during that era survive to this day. The twenty-five member wineries of the Amador County Vintners Association are primarily small, family-owned operations whose proprietors make and sell their own wines.

Temecula Valley Winegrowers Association: The Temecula Valley Winegrowers Association is a regional trade organization of wineries, winegrowers, and related businesses in and around California's Temecula Valley. Mission vineyards were established in Temecula in 1820, and today, the wineries and vineyards of Temecula Valley produce some of the finest wines and winegrapes in the world. The seventy-five members of the Temecula Valley Winegrowers

Association are dedicated to promoting the making and growing of quality wine and winegrapes in the Temecula Appellation.

Santa Cruz Mountains Winegrowers' Association: The Santa Cruz Mountains Winegrowers' Association is a regional organization of wineries, vineyards, and businesses in the Santa Cruz Mountains of California. The Santa Cruz Mountains has been recognized as a premium wine producing region since the late 1800's. Although few of those original wineries survived Prohibition, today, there are over sixty, small, family-owned wineries in this unique grape-growing region. The more than 180 members of the Santa Cruz Mountains Winegrowers' Association focus on producing the highest quality wines and promoting the Santa Cruz Mountains Viticultural Appellation.